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Supreme Court of the United States

October Term, 1973

No. 73-282

ANDRE CHALONEC,

Petitioner,

—against—

PRUDENTIAL LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM E. FULLER
Proctor for Petitioner
17 Battery Place
New York, New York 10004
(212) 344-6100

Supreme Court of the United States

October Term, 1973

No.

ANDRE CHALONEC,

Petitioner,

—against—

PRUDENTIAL LINES, INC.,

Respondent.

MOTION FOR LEAVE TO PROCEED AS A SEAMAN WITHOUT PREPAYMENT OF FEES, COSTS OR SECURITY

The Petitioner, ANDRE CHALONEC, who was and is a seaman as defined in Title 46 U.S.C. Sections 688 and 713, asks leave to file the attached petition for certiorari to the United States Court of Appeals for the Second Circuit without prepayment of fees and costs or furnishing security therefor pursuant to Title 28 U.S.C. Section 1916 and Rule 54(2).

WILLIAM E. FULLER
Proctor for Petitioner
17 Battery Place
New York, New York 10004
212/344-[redacted]

MOTION FOR LEAVE TO PROCEED AS A SEAMAN WITHOUT PREPAYMENT OF FEES, COSTS OR SECURITY

The Petitioner, AMOS CHALONER, who was and is a seaman as defined in Title 46 U.S.C. Sections 688 and 713, duly laws to file the attached petition for certiorari to the United States Court of Appeals for the Second Circuit without prepayment of fees and costs or furnishing security therefor pursuant to Title 28 U.S.C. Section 1916 and Rule 46(2).

WILLIAM R. POELEN
Proctor for Petitioner
17 Battery Place
New York, New York 10004
212/344-6100

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IN THE

Supreme Court of the United States

October Term, 1973

No.

ANDRE CHALONEC,

Petitioner,

—against—

PRUDENTIAL LINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The seaman petitioner ANDRE CHALONEC respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinion Below

The Memorandum Decision and Order of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, D.J., entered March 13, 1972, appears in the Appendix (pp. A-1, A-2). The Court of Appeals for the Second Circuit affirmed without opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on argument March 14, 1973. A petition for rehearing was denied April 4, 1973. Motion to disallow the bill of costs of the United States Department of Justice was granted April 6, 1973 (App. A-13, A-20). A motion for leave to file a petition for rehearing en banc was granted April 26, 1973 and petition for rehearing en banc was denied May 14, 1973. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked here under Title 28 U.S.C. Section 1254(1).

The Questions Presented

I

Does a District Court have Constitutional jurisdiction and judicial power to summarily dismiss as a ". . . controversy to which the United States shall be a party . . ." a seaman Jones Act case against his private employer, who does not appear, but United States attorneys of the Department of Justice voluntarily act as attorneys for the private Defendant and assert statutory defenses of the United States, yet the United States is not a party under the Federal Rules of Civil Procedure?

The District Court so presumed and the Court of Appeals answered affirmatively.

II

If the answer to the foregoing is affirmative, may a District Court presume Constitutional power and jurisdiction contrary to fact and law, and disregard the Federal Rules of Civil Procedure, to grant a summary judgment of

dismissal under Rule 56, F.R.Civ.P. under a two (2) year limitation against the United States to the prejudice of a seaman's Constitutional and statutory right to sue his private Government contractor employer and have a trial by jury?

The District Court and Court of Appeals answered the question affirmatively.

III

If the answers to the foregoing are affirmative, may the District Court do so on the motion of Government attorneys appearing voluntarily without authority in law or the F.R. Civ.P., and without consideration or resolution of factual material at issue from which inferences contrary in fact to Government operation of its vessel or Government employment of Plaintiff seaman or that Defendant private corporation can be an agent or agency of the United States, can be drawn?

The District Court and Court of Appeals answered the question affirmatively.

IV

If the answers to the foregoing are affirmative, may the District Court do so arbitrarily as a matter of law on precedent and without consideration or resolution of factual material at issue from which inferences can be drawn contrary to legal precedent of Government attorneys who know or should know, but do not present to the District Court, facts and statutory law contrary to their representation of private Defendant's position?

The District Court and the Court of Appeals answered the question affirmatively.

V

If the answers to the foregoing are affirmative, may the Court of Appeals affirm arbitrarily without opinion consideration and resolution of factual and legal materials before the Court on the record that Government general agency operation in fact was prohibited (50 App. U.S.C. 1740(b)) and the generally unpublished specific Congressional intent of 46 U.S.C. Section 745 was *not* to bar seamen from suing Government contract private employers on vessels merely owned by the Government?

The Court of Appeals answered the question affirmatively.

Statutes Involved

46 U.S.C. Section 745, as amended by December 18, 1950, c. 1136, 64 stat. 1112:

> "Suits as authorized by this chapter may be brought only within two years after the cause of action arises: *Provided*, That where a remedy is provided by this chapter it shall hereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States or of any incorporated or unincorporated agency thereof whose act or omission gave rise to the claims; . . ."

Legislative History, 81st Congress, Second Session, September 11, 1950, Senate Report 2535, to H.R. 483 (the 1950 *proviso* amendment):

Purpose of the Bill

"The bill will relieve certain litigants by enlarging the present 2-year statute of limitations of the Suits in Admiralty Act (46 U.S.C. 741 et seq.), as amended and supplemented by the Public Vessels Act 46 U.S.C. 781 et seq.), and by the War Shipping Administration (Clarification) Act (50 App. U.S.C. 1291), by granting them an additional year after its enactment within which to bring suit against the United States. Relief is confined to only those cases where timely suits, brought against Government agents or shipmasters, solely in the mistaken belief that they were the operators of vessels *in fact* operated by the Government, have been dismissed because the named defendant was not the operator. To prevent future repetition of such mistakes the bill expressly restates the existing law that the remedy by suit against the United States is exclusive of every other type of action by reason of the same subject matter against the United States or against its employees or agents." [Emphasis added.]

Statement

"The bill merely amends section 5 of the Suits in Admiralty Act so as to lift the bar of the statute of limitations in a few cases when litigants were mistaken as to the identity of the operator of certain Government vessels. *The bill will not in any way change the existing rights of seamen, under either the Jones Act or the general maritime law, to bring suits in admiralty or at law against their private employers who operate, under bare-boat charter or similar arrangements vessels which are merely owned by the Government.* *** [Emphasis added.]

50 App. U.S.C. Section 1740(b); Mar. 8, 1946, c. 82, § 7, 60 Stat. 44; Sept. 26, 1950, c. 1049, § 2(a) (2), 64 Stat. 1038:

"(b) After the cessation of hostilities, operation of vessels in commercial service by the United States, either for its own account or through operating agents under agency agreements, shall, except as to the Panama Canal Company and other services specifically authorized by law, be continued only to the extent necessary to effect orderly transfer of vessels to private operation."

Statement of the Case

Plaintiff seaman petitioner Andre Chalonec seeks a review of a judgment of the Court of Appeals for the Second Circuit which summarily affirmed without opinion a Decision and Order dated and entered March 18, 1972 of the United States District Court for the Southern District of New York, Lloyd F. MacMahon, D.J., granting summary judgment pursuant to Rule 56, F.R.Civ.P. and dismissing Plaintiff-seaman's Complaint with prejudice.

Plaintiff seaman brought this action under the Jones Act, 46 U.S.C. Section 688 *et seq.* and General Maritime Law against Prudential Lines, Inc. as his employer under the facts known to him from practice and his employment contract Foreign Shipping Articles (46 U.S.C. Section 713) as set forth in the Complaint.

The Complaint was filed within the three (3) year limitation under the Jones Act, 46 U.S.C. Section 688 *et seq.* and the six (6) year contract limitation for unseaworthiness under New York law, but over the two (2) year limitation of the United States, from the termination of the voyage of the SS C.C.N.Y. VICTORY during which he incurred two injuries due to the negligence and unseaworthiness of the officers and vessel.

Prudential Lines, Inc. was served by the U.S. Marshal but did not appear.

The Answer of the United States (not sued here) was a general denial and presented the undisputed additional facts that the United States was the bare title owner of the SS C.C.N.Y. VICTORY and that Prudential Lines, Inc. operated the vessel under a Government contract "General Agency Agreement" set forth in 1951 Federal Regulations, Title 32A *Code of Federal Regulations*, Chapter XVIII, Order AGE-1 *et seq.* The Government's *Statement of Undisputed Facts* (App. A-3) under local District Court General Rule 9(g)[1], and Affidavits, added no other facts material to Plaintiff's employment.

The fact in the Complaint that Prudential Lines, Inc. was Plaintiff's employer was undisputed, or disputed only by general denial. The facts of changed conditions, procedures, and private contract operation of the vessel in the Complaint and *Opposition Statements of Undisputed Facts* (App. pp. A-4, A-12) under Rule 9(g)[1] were either undisputed or disputed by general denial only. They are issues of fact for trial.

---

[1] General Rule 9(g), U.S. District Court for the Southern District of New York states:

"Upon any motion for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure, there shall be annexed to the notice of motion a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried.

"The papers opposing a motion for summary judgment shall include a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried.

"All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party."

It is undisputed fact that the suit is against, and that the Government attorneys act for the Marine Protection & Indemnity Insurance Underwriter (Interstate Fire and Casualty Company) in the name of the co-assured, Prudential. The United States, as "Owner" is co-assured under a contract of P & I Insurance pursuant to the same 1951 Federal Regulations, as amended, Title 32A *Code of Federal Regulations*, Chapter XVXIII, Order AGE-1 and INS-1.

The District Court without an evidentiary hearing or findings on opposing facts, disputed or undisputed, for trial, arbitrarily granted the Motion for Summary Judgment pursuant to Rule 56, F.R.Civ.P. of Government attorneys, acting without lawful authority for the United States as a party in complete disregard of the Federal Rules of Civil Procedure.

The Court of Appeals affirmed off the Bench on argument without opinion.

Reasons for Granting Certiorari

A. The case presents an important question of Constitutional jurisdiction and procedural authority of the United States Department of Justice in Federal Courts.

Plaintiff seaman is prematurely deprived of his Jones Act and General Maritime Law rights against his private employer because he served as a seaman assigned by his employer, as a Government contractor, to a vessel owned by the United States, rather than being assigned by his employer, as a private shipowner, to a vessel owned by the employer.

The statutory contract of employment between Plaintiff seaman and Defendant private employer are the same in each instance. (Foreign Shipping Articles, 46 U.S.C. Section 718).

The Constitutionally unfair prejudice to a plaintiff seaman arises when Federal Courts refuse to question their own power, jurisdiction and precedent (but see *Carter* v. *American Export Isbrandtsen Lines, Inc.*, 411 F. 2d 1185 (2 Cir. 1969) even though grounds for such questioning are before the Court as required by Court Rules prior to Summary Judgment (App. pp. A 3 to A 12).

The Federal Courts demonstrate the Constitutionally unfair balance of Government power in the Federal Court versus a seaman, when the Courts rely on Government attorneys who do not question or recognize their own constitutional and statutory duty to abide by the F.R.Civ.P. and limitations of their office (*Hepburn* v. *Griswold*, 75 U.S. 603 (8 Wall.) (1869); *United States* v. *Lee*, 106 U.S. 196, 220, 1 S.Ct. 240, 27 L.Ed. 171 (1882); see also Department of Justice *Bill of Costs as Verified* (App A 13 to A 16) which the Court of Appeals disallowed (App. A 20)).

B. The judgment of affirmance of the Court of Appeals conflicts with decisions of this Supreme Court.

1. The District Court Decision and Order (App. A 1) affirmed by the Court of Appeals which granted a summary judgment of dismissal of Petitioner's seaman's action, without hearing, consideration or resolution of Petitioner's *Opposition Statement of Undisputed Facts* (App. pp. A 4 to A 12) conflicts with *United States* v. *Diebold*, 369 U.S. 654, 655 (1962):

> *"On summary judgment the inferences to be drawn from the underlying facts contained in such materials must be viewed in the light most favorable to the party opposing the motion. A study of the record in this light leads us to believe that inferences contrary to those drawn by the trial court might be permissible. The materials before the District Court having thus raised a genuine issue as to ultimate facts material to the rule of International Shoe Co. v. Federal Trade Com. it was improper for the District Court to decide the applicability of the rule on a motion for summary judgment. Fed. Rules Civ. Proc, 56(c)."* (Emphasis added.)

See also: *Poller* v. *Columbia Broadcasting Co.*, 368 U.S. 464, 467 (1962); *First Nat. Bank* v. *Cities Service*, 391 U.S. 253, (1968) and *Adickes* v. *Kress & Co.*, 398 U.S. 144 (1969).

2. The District Court Decision and Order (App. A 1) affirmed by the Court of Appeals, which granted summary judgment of dismissal of petitioner's seaman's action, misplaced reliance on *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 (1949), which in fact conflicts, along with *Hust* v. *Moore-McCormack Lines, Inc.* 328 U.S. 707 (1946) and *Brady* v. *Roosevelt S.S. Co.*, 317 U.S. 575 (1942) on the question of liability of a private general agent in the shipping business.

Where the Second Circuit had held the General Agent liable as Jones Act employer under *Hust*, the Court in *Cosmopolitan stated* (337 U.S. 783, 787):

> "... The Court of Appeals reached this conclusion despite the fact that the injury to Hust occurred

> prior to the Clarification Act, and the injury here occurred subsequent to that act. *In its view the Hust case held, as a matter of law, that before the Clarification Act as a seaman under the Jones Act could recover for a tort against a service agreement general agent, as an employer.* The Court did not perceive how the Clarification Act changed this liability. 169 F. 2d 4, 8." (Emphasis added).

and after the "Clarification" Act concluded (337 U.S. 800-801):

> "Thus the cases and an analysis of the relations established by the standard form government agreement lead to the conclusion that an agent such as Cosmopolitan, who contracts to manage certain shoreside business of a vessel operated by the War Shipping Administration, it not liable to a seaman for injury caused by the negligence of the master or crew of such a vessel."

It is obvious that the Court decided the issue of *Cosmopolitan* under the facts, practices, forms and law that existed during World War II and the War Shipping Administration when the Government *in fact* operated the Government owned vessel (337 U.S. 790-791):

> "The issue in this case is whether a construction of the Jones Act carrying out the intention of Congress to grant those new rights to seamen against their employers requires or permits a holding that the general agent under the contract here in question is an employer under the Jones Act. The decision depends upon the interpretation of the contract between respondent and Cosmopolitan on one hand and that between Cosmopolitan and the United States

on the other. We assume, without deciding, that the rule of the *Hearst* case applies, that is, the word 'employment' should be construed so as to give protection to seamen for torts committed against them by those standing in the proximate relation of employer, and the rules of private agency should not be rigorously applied.[11] *Yet this Court may not disregard the plain and rational meaning of employment and employer to furnish a seaman a cause of action against one completely outside the broadest lines of definition of employment or employer.* We have no doubt that, under the Jones Act, only one person, firm, or corporation can be sued as employer. Either Cosmopolitan or the Government is that employer.[12] *The seaman's substantive rights are the same whoever is the employer. Under the Jones Act, his remedy permits him to demand a jury trial.* If the Government is the employer, his remedy is in admiralty without a jury. See the excerpt from the House Report, p. 792, infra."* [Emphasis added.]

The facts inherent in the materials before the District Court make it plain that the United States is no longer factually or lawfully Plaintiff seaman's *employer*, for Jones Act or other denial of benefits purposes, just because the Government owns the vessel and the operator is a Government contractor!

The District Court's finding on only two facts represents an erroneous choice of inferences to be drawn from the subsidiary facts inherent or specified in Plaintiff's material before the Court and undisputed by the Government's proof of the two uncontested facts. (See *United States* v.

* U.S. *footnotes* omitted.

Diebold, supra). It should be noted that the Government Answer only generally denies the Complaint allegation that Defendant Prudential was Plaintiff's employer, but presents no facts in opposition.

50 App. U.S.C. 1740 (b) prohibits Government operation *in fact* after 1950. Even assuming *arguendo* a lawful authorized government contract under 41 U.S.C., which is denied, the unauthorized *fait* creation of *public agency* (5 U.S.C.) by the post-1951 private operation Federal Regulation Agreement, as a conclusion of law contradicted *in fact*, was intended to, but can not bring a seaman's action within 46 U.S.C. Section 745 for limitation and dismissal by summary judgment.

Other facts of changed conditions in 1967 are in materials before the Court which distinguish *Cosmopolitan* on the factual conclusion of employment. A return to the election of private general agent liability law of *Hust* and *Brady*, before the unique 1946-1949 factual and legal basis of *Cosmopolitan*, is mandated for Defendant here *after* termination of that *in fact* government employment.

C. The judgment of affirmance of the Court of Appeals conflicts with Statutes of the United States.

The *Opposition Statement of Undisputed Facts* (App. A 4 to A 12) makes specific references to Federal Statutes violated by the 1951 *fait* General Agency Agreement contract, and discriminatory position of seamen thereunder, as contended for by Government attorneys and impliedly approved by the District Court and Court of Appeals.

In general, since 1951, Government officers of the Maritime Administration and attorneys of the Department of Justice, with the specific objective of public financial profit at the expense of seamen manning Government owned vessels, have:

(a) continued a private shipping business with Government owned vessels in competition with private shipping business; and

(b) continued a private marine employer's liability insurance business, including adjusting and defending seamen's claims, in competition with private shipping business and underwriters; and,

(c) with contract delegation of the full powers of the United States (Art. 10) made private corporations, domestic and foreign, and their Master employees, depository, disbursing and accounting agents for public monies, with resulting predictable financial detriment to seamen and the United States; and

(d) with prohibited cost-plus-a-percentage-of-cost and profit-sharing contract conditions; and

(e) by an improper "contractor furnished personnel" type of contract, continued to hold seamen in the limbo status of pre-1949 W.S.A. Clarification; i.e., Government employees for deprivation of rights of seaman against a private employer but not Government employees for the statutory benefits of Government employees.

D. The judgment of affirmance of the Court of Appeals is an unequitable precedent which prejudices statutory and Constitutional rights of seamen employed under "bare title United States Government ownership."

It is incongruous for a seaman to be statutorily barred from suing the U.S. Government and therefore must sue his private employer only consequently to find the action defended by attorneys for the U.S. Government.

The District Court Decision and Order (App. A-1) affirmed by the Court of Appeals, which granted a summary judgment of dismissal of Petitioner's seaman action on Government attorney voluntary representation of the private Defendant with incomplete facts and law, contradicts the traditional rule that a seaman is the *ward* of the Federal Admiralty Court. Here, with the opposition of Government attorneys on technical procedural grounds, the Federal Admiralty Court, by summary judgment arbitrarily denied the *ward* even his day in trial court.

If this court denies certiorari, a legal "limbo" or "vacuum" will exist as to seaman's right contrary to all legislative intent and judicial precedents. In effect the U.S. Government attorneys will have *suppressed* the traditional right to trial on procedural grounds.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

WILLIAM E. FULLER
17 Battery Place
New York, New York 10004
Proctor for Petitioner

APPENDIX

Memorandum Opinion

71 Civ. 723

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ANDRE CHALONEC,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.

Defendant.

MAC MAHON, *District Judge.*

Defendant moves for summary judgment under Rule 56, Fed.R.Civ.P.

Plaintiff sued defendant, Prudential Lines, Inc., for injuries allegedly sustained on February 8 and March 6, 1968, while a crew member aboard the vessel SS "CCNY VICTORY." It is undisputed that the vessel was owned by the United States of America and, pursuant to a standard General Agency agreement (32a C.F.R., chap. XXIII), defendant was merely the government's agent for managing and otherwise conducting the business of the vessel.

A general agent cannot be sued for injuries sustained aboard a vessel that is owned by the government. Plaintiff's exclusive remedy is to sue the government. 46 U.S.C. § 745; *Cosmopolitan Shipping Co.* v. *McAllister*,

Memorandum Opinion

337 U.S. 783 (1949); *Carter* v. *American Export Isbrandtsen Lines, Inc.*, 411 F. 2d 1185 (2d Cir. 1969); *Williams* v. *Prudential S.S. Co.*, 1970 A.M.C. 242 (S.D.N.Y. 1970). Thus, the complaint fails to state a claim for relief against defendant.

Accordingly, defendant's motion for summary judgment is granted. There being no just reason for delay, the Clerk of the court is directed to enter judgment dismissing the complaint.

So ordered.

Dated: New York, N. Y.
March 18, 1972

LLOYD F. MACMAHON
United States District Judge

Statement Under Rule 9(g) of the General Rules for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 CIV. 723

ANDRE CHALONEC,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.

Defendant.

1. At the time of the alleged incident the SS C.C.N.Y. VICTORY was owned and operated by the United States of America.

2. At the time of the alleged incident the SS C.C.N.Y. VICTORY was husbanded by the defendant, Prudential Lines, Inc., as a general agent, under the terms of a General Agency Agreement between it and the United States.

3. The plaintiff cannot bring suit against the general agent by reason of the Suits in Admiralty Act, 46 U.S.C. § 745.

Dated: New York, N. Y.
November 2, 1971.

WHITNEY NORTH SEYMOUR, JR.
United States Attorney
GILBERT S. FLEISCHER
Attorney in Charge
Admiralty & Shipping Section
Department of Justice
26 Federal Plaza, Suite 4048
New York, N.Y. 10007
Attorneys for Defendant

By: Michael J. Pangia
Michael J. Pangia

Opposition Statement of Undisputed Facts Under Rule 9(g) of the General Rules for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

71 Civil 723

ANDRE CHALONEC,

Plaintiff,

—against—

PRUDENTIAL LINES, INC.

Defendant.

---

1. The S.S. C.C.N.Y. VICTORY was owned by the United States of America and under the possession and control of the Department of Commerce, Maritime Administration for the United States.

2. The SS C.C.N.Y. VICTORY in 1967 was being operated by the United States of America, Department of Commerce, Maritime Administration, "National Shipping Authority", under alleged "War Powers" for its own account under a General Agency Agreement where the War Powers statute, Title 50 App. U.S.C. 1740(b) states:—

> **"(b) After the cessation of hostilities [World War II], operation of vessels in commercial service by the United States, either for its own account or through operating agents under agency agreements, shall, except as to . . . other services specifically authorized by law, be continued only to the extent**

Opposition Statement of Undisputed Facts Under Rule 9(g) of the General Rules for the Southern District of New York

necessary to effect orderly transfer of vessels to private operation. March 8, 1946, C.82, Sec. 7, 60 Stat. 44; Sept. 26, 1950, c. 1049, Sec. 2(a) (2) 64 Stat. 1038."

3. The Plaintiff *can* bring suit against the General Agent because the legislative history of the 1950 Amendment to the Suits in Admiralty Act, 46 U.S.C. 745 shows:—

". . .The bill will not in any way change the existing rights of seamen, under either the Jones Act or the general maritime law, to bring suits in admiralty or at law against their private employers who operate, under bareboat charter or similar arrangements, vessels which are merely owned by the Government. . . ."

4. Prudential Lines, Inc. was the general agent for the S.S. C.C.N.Y. VICTORY, under a General Agency Agreement under "War Power" Federal Regulations (Title 32A *Code of Federal Regulations*, Chapter XVIII) between Prudential and the United States.

5. The General Agency Agreement in 1968 and since 1951 in Title 32A C.F.R. Chapter XVIII is in the same terms as the G.A.A. agreement used by the War Shipping Administration during World War II and Maritime Administration until 1949, under the *War Shipping Administration (Clarification) Act*, March 23, 1943, P.L. 17, 78th Cong., 1st Sess. [H.R. 133]:

"Rights of Merchant Seamen Employed by the U.S. through the W.S.A.

Opposition Statement of Undisputed Facts Under Rule 9(g) of the General Rules for the Southern District of New York

> SEC. 1. That (a) officers and members of crews (hereinafter referred to as 'seamen') employed on United States or foreign flag vessels as employees of the United States through the War Shipping Administration shall, with respect to (1) laws administered by the Public Health Service and the Social Security Act, as amended by subsection (b) (2) and (3) of this section; (2) death, injuries, illness, maintenance and cure, loss of effects, detention, or reparation, or claims arising therefrom not covered by the foregoing clause (1); and (3) collection of wages and bonuses and making of allotments, have all of the rights, benefits, exemptions, privileges, and liabilities, under law applicable to citizens of the United States employed as seamen on privately owned and operated American vessels."

6. Those Federal Regulations issued by the "National Shipping Authority", a "sub-agency" of the Maritime Administration created by order of the Secretary of Commerce are *ultra vires*, not based upon any valid delegated statutory authority of Congress, and in direct violation of statutes governing (1) Government Contracts (Title 41, U.S.C.; Title 10, U.S.C. 2301 *et seq.*, Federal and Armed Forces Procurement Regulations, (Title 32 C.F.R.); (2) Government employees and agents (Title 5 U.S.C.); (3) Government agents for disbursing and accounting for public monies (Title 31 U.S.C.); (4) War Risk Marine Insurance (46 U.S.C. 1281 *et. seq.*) and (5) Seamen's Claims and rights (46 U.S.C. Chapter 18). For example, the administrative regulations of the G.A.A. system (Title 32A

Opposition Statement of Undisputed Facts Under Rule 9(g) of the General Rules for the Southern District of New York

CFR Chapter XVIII), with respect to corporate agents and subagents, *domestic and foreign*, makes them:—

(a) agents with delegated full powers of the United States;

(b) depositories, disbursing and accounting agents for public monies of the United States;

(c) co-insureds of the United States under insurance purchased by the United States;

(d) profit sharing in the vessel revenues with the United States (contrary to the Third Supplemental Appropriation Act, 1951 and the Certificate of Ownership and Operation of such vessels which direct that all revenues are for the account of the Government of the United States.

7. The General Agency Agreement system and contract were never authorized by Congress. The War Shipping Administration was established by Executive Order #9045 on February 2, 1942 under the War Powers Act to perform the merchant shipping business functions for the Government free of the usual restrictions applicable to Government agencies. (See *U.S. Government Organization Manual* 1968-1969, App. A, p. 726.

8. The G.A.A. system under the War Shipping Administration, never favored by Congress, was forced into termination by Congress in 1949 after reluctant extension from 1946. (S. Rep. No. 483, June 9, 1949 and H. Rep.

Opposition Statement of Undisputed Facts Under Rule 9(g) of the General Rules for the Southern District of New York

No. 564, May 11, 1949 to accompany H. J. Res. 235, 1949 *U. S. Code Cong. Serv.* 1454, 1460).

9. The G.A.A. system as revised in 1951 competed directly with private shipping through 1969 until the "National Shipping Authority" *disappeared* (compare *U. S. Government Organization Manual* 1968-1969 ed. pp. 315-317 and 1969-1970 ed. pp. 291-292 and Appendix A). It was operated solely on unauthorized and excessive discretionary authority of the Secretary of Commerce, Maritime Administration, National Shipping Authority, without any direct, specific Congressional authorization. The claimed statutory authorization is the Third Supplemental Appropriation Act, 1951, authorizing a *Vessel Operations Revolving Fund.*

10. The General Agency Agreement contract is a contractor-furnished personnel services contract. Opinions of the General Counsel of the Civil Service Commission on February 12, 1965 and October 18, 1967, concurred in by the Comptroller General of the United States, Opinions B-156219 of June 1, 1965 and B-133394 of November 1, 1967, ruled such contractor-furnished personnel service contracts are not authorized by law. See H. Rep. No. 188. 89th Cong. 1st Sess., 1965, which gives the following partial list of personnel statutes evaded by contracting for personnel:—

The Civil Service Act, 5 U.S.C. 632 *et. seq.*

The Classification Act of 1949, as amended, 5 U.S.C. 1071 *et seq.*

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The Veterans' Preference Act, 5 U.S.C. 851 *et seq.*

The Hatch Political Activities Act, 5 U.S.C. 1181-o.

The Dual Compensation Laws, e.g., 5 U.S.C. 58, 59a, 59, 59b, 60, 61a-1.

The conflict-of-interest laws, e.g., 18 U.S.C. 203, 205, 207, 208, 209.

The Antistrike Law, 5 U.S.C. 118p.

The Federal Employees' Compensation Act, 5 U.S.C. 751 *et. seq.*

The Civil Service Retirement Act, 5 U.S.C. 2251 *et seq.*

The Federal Employees' Group Life Insurance Act, 5 U.S.C. 2091 *et. seq.*

The Federal Employees' Health Benefits Act, 5 U.S.C. 3001 *et. seq.*

The Government Employees' Training Act, 5 U.S.C. 2301 *et seq.*

The Federal Tort Claims Act, 28 U.S.C. 2671 *et. seq.*

11. Under the G.A.A. contract and regulations (32A C.F.R. Chapter VXIII INS-1) the administrative agency is operating a marine insurance business (in competition with private business) in violation of law and in excess of any Congressional authorized stand-by War Risk Insurance authority (46 U.S.C. 1281 *et seq.*).

(a) The administrative agency is buying a non-war risk insurance, Marine Protection & Indemity

Opposition Statement of Undisputed Facts Under Rule 9(g) of the General Rules for the Southern District of New York

Insurance (P&I), co-insuring the United States, the General Agent and sub-agents, domestic and foreign.

(b) The administrative agency is providing P&I insurance from an American insurance company where both 46 U.S.C. 1282 and 1286 grant such authority only:

"***whenever it appears to the Secretary . . . that such insurance . . . *cannot* be obtained on reasonable terms and conditions from companies authorized to do an insurance business in a State of the United States."

(c) The administrative agency is providing marine P&I liability insurance for general agents as persons performing services or facilities for vessels, where marine P&I liability insurance is an "employer's liability" insurance and 46 U.S.C. 1286 states:

"Such insurance shall not be issued against liability to employers in respect of employers' liability or workmen's compensation."

(d) The administrative agency by P&I insurance regulations and seamen's claims regulations is affecting the rights of seamen under the Jones Act (46 U.S.C.A. 688 *et. seq.*) where 46 U.S.C. 1290 states:

"This subchapter shall not affect rights of seamen under existing law. June 29, 1936, c.858 § 1210, as decided Sept. 7, 1950, c.906, 64 Stat. 773."

Opposition Statement of Undisputed Facts Under Rule 9(g) of the General Rules for the Southern District of New York

12. The G.A.A. contractor-furnished personnel contractor makes officers or agents of the United States for the transaction of business directly or indirectly interested in the pecuniary profits of these shipping contracts and insurance contracts, and directly involved in seamen's claims. Many conflicts of economic self-interest arise to violate conflict of interest statutes, 18 U.S.C. 205 and 208. See *U.S. v. Mississippi Valley Generating Co.*, 364 U.S. 562, which arose out of the Dixon Yates contracts, and the similar situation of administrative agency and contract employee serving too many masters.

13. Under the G.A.A. system seaman's claims are being adjusted in the administrative agency with legal defense provided by U.S. Attorneys, either directly or by the hiring of attorneys to represent the United States in direct violation of 5 U.S.C. 3106. The Government is manipulating so that a seaman on a G.A.A. vessel is a government employee without civil service benefits and, because he was on a G.A.A. ship of the general agent company, rather than a private ship of the same company:—

(1) He gets an administrative claim procedure which bars his claim if he fails to exhaust the administrative "remedy". (See Title 32A C.F.R. Chapter XVIII, LRP-1—Seamen's Claims).

(2) He gets a two year statute of limitations on his rights under the Jones Act instead of three years against a private employer.

Opposition Statement of Undisputed Facts Under Rule 9(g) of the General Rules for the Southern District of New York

(3) He loses his right to penalty wages under 46 U.S.C. 596 held not recoverable against the United States under civil service precedents.

(4) He loses his right to trial by jury under the Jones Act, which he would have if this were a private ship of the same company.

(5) He loses his right to sue his Company or Master individually, under remedial statutes and for common law breach of contract and for individual violations of other statutory rights of seamen since the Company and Master become "agents" of the United States and practically individually immune for improper acts in discharge, accounts, log entries, etc. (46 U.S.C. Chapter 18)

(6) He gains no benefits of a statutory Government employee of the United States on a public vessel.

Dated: New York, N. Y.
February 11, 1972.

WILLIAM E. FULLER
FULLER LAWTON & MOYLES, *P.C.*
Attorneys for Plaintiff
17 Battery Place
New York, N. Y. 1004
(212) 344-6100

Affidavit of Verified Bill of Costs

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 72-1457

ANDRE CHALONEC,

Plaintiff-Appellant,

—against—

PRUDENTIAL LINES, INC.

Defendant-Appellee.

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } ss.:

I, Eloise E. Davies, an attorney in the Civil Division, Appellate Section, United States Department of Justice, hereby verify and affirm that the following costs were incurred by the Department of Justice in representing the appellee in connection with the appeal of the above case. In support thereof, I attach a copy of our printer's itemized bill.

100 sheets cover paper at $.80 per hundred	$ .80
50 separator sheets at $.60 per hundred	.60
850 sheets text paper at $.50 per hundred	4.50
Typing camera copy and preparing 13 plates at $1.75 each	22.75
Preparing 22 plates from camera copy at $.75 each	16.50
1750 Press impressions at $.025 each	43.75
Collating at $.31 per copy	10.50
Stitching at $.08 per copy	4.00
TOTAL	$103.40

Affidavit of Verified Bill of Costs

Subscribed and sworn to before me this 21st day of March, 1978.

/s/ SHARON SCHULT

NOTARY PUBLIC

My Commission expires May 31, 1977.

/s/ Eloise E. Davies
ELOISE E. DAVIES
Attorney, Department of Justice
Washington, D.C. 20530

United States Government Memorandum

Department of Justice

March 16, 1973

To: Mr. Morton Hollander
Chief, Appellate Section
Civil Division

From: Winslow H. Joy
Chief, General Services Section

Subject: Cost of Duplicating Brief of Appellee

This is to certify that the cost of duplicating 50 copies by the photo offset method of the Brief for the Appellee No. 72-1457 entitled "Andre Chaicnec v. Prudential Lines, Inc." and filed in the United States Court of Appeals for the Second Circuit was as follows:

100 sheets cover paper at $.80 per hundred	$ .80
50 separator sheets at $.60 per hundred	.60
850 sheets text paper at $.50 per hundred	4.50
Typing camera copy and preparing 13 plates at $1.75 each	22.75
Preparing 22 plates from camera copy at $.75 each	16.50
1750 press impressions at $.025 each	43.75
Collating at $.21 per copy	10.50
Stitching at $.08 per copy	4.00
TOTAL	$103.40

Certificate of Service

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 72-1457

ANDRE CHALONEC,

Plaintiff-Appellant,

—against—

PRUDENTIAL LINES, INC.

Defendant-Appellee.

I hereby certify that on this 21st day of March, 1973, I served the foregoing attached Affidavit of Verified Bill of Costs and our printer's itemized bill of costs upon counsel for the appellee by causing them to be sent, postage prepaid, to the following:

WILLIAM E. FULLER, ESQUIRE
Fuller, Lawton & Moyles, P.C.
17 Battery Place
New York, New York 10004

/s/ Eloise E. Davies
ELOISE E. DAVIES

Objection to Bill of Costs as Verified

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 72-1457

ANDRE CHALONEC,

Plaintiff-Appellant,

—against—

PRUDENTIAL LINES, INC.

Defendant-Appellee.

Plaintiff-Appellant seaman ANDRE CHALONEC, by his attorneys, hereby objects to the Bill of Costs, as verified March 21, 1973 by an attorney of the United States Department of Justice, Washington, D.C. on the following grounds:

1. That the United States is not a party and appears and acts voluntarily; not under any lawful procedure authorized by the Federal Rules of Civil Procedure. The United States was not named in the Complaint or Summons, nor served by the United States Marshal. (App. 1, 4, 9). The United States acts only because a District Court Clerk, a Government employee of the Judicial Branch does not question or refuse a Department of Justice Government employee of the Executive Branch, and both unlawfully and collusively, in excess of any lawfully authorized authority, offer and accept a voluntary, unauthorized appearance, Answer and/or Motion for Summary Judgment. These unauthorized agents and employees of the United States unlawfully deprive Plaintiff of civil and Constitu-

tional rights, in this case, Plaintiffs right to sue; a jury trial on disputed facts; due process of law and equal protection of law.

2. Judicial clerical and Executive attorney employees, by the Bill of Costs, further attempt to deprive Plaintiff of property without due process of law, in that:

(a) The Bill of Costs is for fifty (50) copies; and,

(b) Rule 39(c), F.R.App.P. allows the costs of printing or otherwise producing *necessary* copies of briefs authorized by Rule 31(b); and

(c) Rule 31(b), F.R.App.P requires twenty-five (25) copies of each brief to be filed with the Clerk and Appellant received two (2) copies.

Plaintiff-Appellant contends that a bill for fifty (50) copies is unreasonable and wrongfully compels Plaintiff seaman, who does not recover in the action, to assume the costs of an unnecessary number of briefs prepared by the Department of Justice for its own internal administrative purposes.

Dated: New York, New York
March 28, 1978.

Respectfully submitted,

WILLIAM E. FULLER
FULLER LAWTON & MOYLES, P.C.
17 Battery Place
New York, New York 10004

Certificate of Counsel

I, WILLIAM E. FULLER, Proctor for Plaintiff-Appellant seaman ANDRE CHALONEC, do hereby certify that the foregoing Objection to Bill of Costs as Verified is presented in good faith, is in my opinion well founded and is not filed for purpose of delay.

WILLIAM E. FULLER
Proctor for Plaintiff.

Affidavit of Service by Mail

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

Patricia Maiorano, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 220 Demorest Avenue, Staten Island, New York 10314. That on the 23rd day of March, 1978 deponent served the within Objections to Bill of Costs as Verified upon:

CLERK OF THE COURT
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
United States Courthouse
Foley Square
New York, New York 10007
(Original and three copies)

HARLINGTON WOOD JR.,
Assistant Attorney General
WHITNEY N. SEYMOUR, JR.,
United States Attorney
MORTON HOLLANDER,
ELOISE E. DAVIS,
Attorneys
Department of Justice
Washington, D. C. 20530

by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office Department wtihin the State of New York.

(Sworn to before me this 23rd day of March, 1978.)

/s/ Patricia Maiorano

Order Disallowing Costs

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the sixth day of April, one thousand nine hundred and seventy-three.

ANDRE CHALONEC,

Plaintiff-Appellant,

v.

PRUDENTIAL LINES, INC.

Defendant-Appellee.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated March 23, 1978 to disallow the itemized and verified bill of costs filed March 23, 1978 be and it hereby is granted.

April 6, 1978

PAUL R. HAYS
Circuit Judge

Certificate of Service

I hereby certify that on this 10th day of August, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Prudential Grace Lines, Inc., 1 New York Plaza, New York, New York 10004 and the Solicitor General, Department of Justice, Washington, D.C. 20530. I further certify that all parties required to be served have been served.

WILLIAM E. FULLER
17 Battery Place
New York, New York
Proctor for Petitioner

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 2 1973

No. 73-252

In the Supreme Court of the United States

OCTOBER TERM, 1973

ANDRE CHALONEC, PETITIONER

v.

PRUDENTIAL LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-282

ANDRE CHALONEC, PETITIONER

v.

PRUDENTIAL LINES, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner allegedly sustained injuries in early 1968 while serving as a crew member aboard the SS C.C.N.Y. VICTORY. At the time, the vessel was owned by the United States and, under a standard general agency agreement, was assigned to Prudential Lines, Inc. ("Prudential") to manage and conduct the business of the vessel. Because the vessel was owned by the United States, petitioner had a right of action against the United States under the Public Vessels Act, 43 Stat. 1112, 46 U.S.C. 781, any such action being subject to the provisions of the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. 741.

In 1971, after the two-year statute of limitations on suits against the United States under the Suits in Admiralty Act had run, 46 U.S.C. 745, petitioner sued Prudential in the United States District Court for the

Southern District of New York claiming negligence on the part of the ship's officers and unseaworthiness of the vessel. Upon motion of the United States Attorney, the district court granted summary judgment for Prudential on the ground that such a suit against an agent of the United States was barred by a 1950 amendment to the Suits in Admiralty Act, 46 U.S.C. 745, which provides that where a remedy is provided by the Act "it shall thereafter be exclusive of any other action by reason of the same subject matter against the agent or employee of the United States * * * whose act or omission gave rise to the claim * * *" (Pet. App. A1-2). The court of appeals summarily affirmed.

Petitioner contends that Section 745 should not be applied because there has been a change in the wartime conditions underlying the decision of this Court in 1949 which was in effect codified in Section 745, *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783.[1] There is no merit to petitioner's contention.

1. The courts of appeals have uniformly held that 46 U.S.C. 745 precludes a crew member from suing an agent for injuries sustained aboard a government owned and operated vessel. See, *e.g.*, *Petition of the United States*, 367 F. 2d 505, 508-511 (C.A. 3); *Smith* v. *United States*, 346 F. 2d 449, 453-454 (C.A. 4);

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[1]In *Cosmopolitan* the Court held that "an agent such as Cosmopolitan, who contracts to manage certain shoreside business of a vessel operated by the War Shipping Administration, is not liable to a seaman for injury caused by the negligence of the master or crew of such a vessel." 337 U.S. at 801. The Court overruled its prior decision in *Hust* v. *Moore-McCormack Lines*, 328 U.S. 707, 723-725, relied on by petitioner, where it had held that a seaman in such circumstances had an alternative right of action against the agent under the Jones Act. See *Cosmopolitan*, *supra*, 337 U.S. at 787-794.

Hanlon v. *Waterman S.S. Corp.*, 265 F. 2d 206, 207 (C.A. 2), certiorari denied, 361 U.S. 822. By virtue of first the decision in *Cosmopolitan* and then the 1950 amendment to the Suits in Admiralty Act, an injured crew member in petitioner's situation is limited to a remedy by way of a suit against the United States under the Act.[2] Because the statute codifying the *Cosmopolitan* rule remains in full force and effect, petitioner's effort to relitigate *Cosmopolitan*, even if successful, could not alter the applicability and bar of 46 U.S.C. 745. It is now immaterial whether this Court's decision in *Cosmopolitan* was prompted by wartime operating conditions or whether there have been changes in the relationships among the United States as shipowner, its general agents, and the seamen manning the government-owned vessels they operate. Thus, in *Carter* v. *American Export Isbrandtsen Lines, Inc.*, 411 F. 2d 1185, 1186 (C.A. 2), the court of appeals rejected petitioner's argument that *Cosmopolitan* and the codifying statute were inapplicable because "based on wartime measures" by stating: "We are satisfied, as other courts have been, that the rule remains effective."

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[2]Congress unquestionably had the power thus to withhold from a crewman on a publicly-owned, but privately-managed, cargo vessel the right to sue the general agent. See *Smith* v. *United States*, 346 F. 2d 449, 454 (C.A. 4); *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337. Under 46 U.S. 745 the United States in effect binds itself to hold the agent harmless against liabilities arising in the conduct of its ships. The crew member has a remedy against the United States equivalent to that which the Jones Act grants him against a private employer, except that a jury trial is withheld. *Petition of the United States*, 367 F. 2d 505, 511-512 (C.A. 3). The withdrawal of a jury trial is also clearly permissible. *Maricopa County* v. *Valley National Bank*, 318 U.S. 357, 362; *Lynch* v. *United States*, 292 U.S. 571, 581-582; *Crowell* v. *Benson*, 285 U.S. 22, 45-47.

2. Petitioner's basic premise of changed conditions is unsound. Not only was *Cosmopolitan* decided in 1949, after World War II had ended, but also any changes which have since occurred in the government's operation of its vessels have not affected significantly the form and content of the standard agency agreement.[3] Therefore, despite the passage of time since *Cosmopolitan* was decided, there has been no material alteration in the legal relationship between the United States and its general agents who conduct the business of its vessels.[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.

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[3]Reference to the opinion in the *Cosmopolitan* case, 337 U.S. at 795-796, and to the agreement between the United States and Prudential Steamship Corporation in the present case (Court of Appeals Brief for the Appellee, Addendum p. 7a-9a) make this clear. The latter agfeement complied in all respects with the applicable regulations. 32A C.F.R. ch. XVIII AGE-1.

[4]In view of the relationship between the United States and its general agent, it was not improper, as petitioner suggests, for government attorneys to represent Prudential Lines in the proceedings below. It is the duty of the United States Attorney to "defend, for the government, all civil actions, suits or proceedings in which the United States is concerned." 28 U.S.C. 547; *Carter v. American Export Isbrandtsen Lines, Inc.*, 411 F. 2d 1185, 1186 (C.A. 2).

1033-1973-10